No. 11013

In the United States Circuit Court of Appeals for the Ninth Circuit

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLANT

v.

L. G. TRUILLINGER, APPELLEE

APPELLANT'S BRIEF

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CITATIONS

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BRIEF FOR APPELLANT

JURISDICTION

This is an appeal by the Price Administrator from a judgment of the United States District Court for the District of Oregon dismissing an action by the Price Administrator brought under the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. A. App. Supp. II, Sec. 901 *et seq.,* as amended by the Stabilization Extension Act of 1944 (58 Stat. 636) seeking damages under Section 205 (e) as amended (50 U. S. C. A. Sec. 925 (e)). The judgment dismissing the action was entered December 6, 1944 (R. 12). Notice of appeal was filed December 28, 1944 (R. 11).

Jurisdiction of the District Court was invoked under Section 205 (e) of the Act (50 U. S. C. A. Sec. 925 (e)) as indicated in the complaint (R. 2) and

jurisdiction of this Court is invoked under Section 128 of the Judicial Code (28 U. S. C. Sec. 225).

STATUTES AND REGULATION INVOLVED

The action involves the Emergency Price Control Act of 1942, as amended, and Maximum Price Regulation 136, as amended, issued pursuant to Section 2 (a) of the Act. The pertinent sections of the Act as amended are:

> SEC. 205 (e). If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, *within one year from the date of occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determinate, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions*

against the occurrence of the violation.[1] For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; *and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price.*[2] If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer *either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was*

[1] As amended by Sec. 108 (b) of Stabilization Extension Act of 1944. Formerly read, in place of italicized language:

"* * * bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court."

[2] Added by Sec. 108 (b) of Stabilization Extension Act of 1944.

rendered.[3] *The amendment made by subsection (b), insofar as it relates to actions by buyers or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the violation, shall be applicable only with respect to violations occurring after the date of enactment of this act. In other cases, such amendment shall be applicable with respect to proceedings pending on the date of enactment of this Act and with respect to proceedings instituted thereafter.*[4]

STATEMENT OF FACTS

This is an appeal from a final judgment (R. 13) dismissing an action brought by the Price Administrator against the defendant for statutory damages under Section 205 (e) of the Emergency Price Control Act of 1942,[5] hereinafter referred to as the Act.

The complaint (R. 2–4) alleged that on or about April 7, 1943, the defendant sold and delivered to Earl

[3] As amended by Sec. 108 (b) of Stabilization Extension Act of 1944. Formerly read, in place of italicized language:

"* * * is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act."

[4] Sec. 108 (c) of Stabilization Extension Act of 1944.

[5] 56 Stat. 23, 50 U. S. C. App. Supp. II, Sec. 901 et seq. as amended by the Stabilization Extension Act of 1944, Pub. Law No. 383, 78th Cong., 2d sess., June 30, 1944.

Gilmore a used tractor at a price in excess of the maximum price established therefore by Maximum Price Regulation No. 136, as amended,[6] (hereinafter referred to as MPR No. 136). The complaint further alleged that the machine was not purchased by Earl Gilmore for use and consumption other than in the course of trade or business. The Administrator demanded judgment for treble the amount by which the purchase price exceeded the maximum price (R. 3).

After interposing an amended and supplemental answer (R. 4–5) constituting in effect a general denial, together with the defense that the sale was made in good faith and that practicable precautions were taken to avert the violation, a pretrial order was entered on November 13, 1944 (R. 7–9).

Under this order, it was admitted that the court had jurisdiction; that Maximum Price Regulation No. 136, as amended, establishing maximum prices for certain types of tractors and other types of machinery was in effect; that defendant sold the tractor for $2,800. It was agreed that the disputed issues were (a) whether the sale of the used tractor was covered by M. P. R. 136; (b) the maximum legal price of the tractor; (c) whether the sale was made for use or consumption in the course of trade or business; (d)

[6] Issued originally by the Administrator pursuant to Section 2 (a) of the Act on April 28, 1942 (7 F. R. 3198) as amended June 30, 1942 (7 F. R. 5047) as amended April 5, 1943 (8 F. R. 4476), as amended May 3, 1944 (8 F. R. 16132).

the amount of the excess charges; and (e) defendant's good faith and lack of wilfulness (R. 7–8).

After a trial, at which the undisputed evidence showed that Gilmore was in the logging business and that he purchased the tractor from defendant for his logging operations (R. 28, 30), the court found as a fact that the sales price of $2,800 for the tractor was in excess of the maximum price provided therefore by M. P. R. No. 136 in the approximate amount of $462.50, but that the sale was made to Gilmore as an ultimate consumer and for use or consumption not in the course of trade or business within the meaning of the Act. (R. 11). The court concluded as a matter of law that by said sale defendant had not violated M. P. R. No. 136; that the right of action was in the purchaser and not in the Administrator, and that the complaint should therefore be dismissed (R. 12). Judgment to that effect was entered on December 6, 1944 (R. 13), and from it this appeal was taken by the Administrator on December 28, 1944 (R. 13–14).

SPECIFICATIONS OF ERROR

(1) The court erred in finding as a fact that the sale of the tractor to Earl Gilmore was a sale made to him for use or consumption not in the course of trade or business within the meaning of the Emergency Price Control Act (Fact Finding IV, R. 11).

(2) The court below erred in holding that where the purchaser is an ultimate consumer, then he and not the Price Administrator has the right of action. (See, Fact Finding IV, R. 11, Conclusion of Law II, R. 12.)

(3) The Court erred in concluding as a matter of law that in said sale by defendant, he had not violated Maximum Price Regulation No. 136 (Conclusion of Law I, R. 11).

(4) The Court erred in concluding as a matter of law that the right of action arising out of the sale was in the purchaser, Earl Gilmore, and not in the Price Administrator (Conclusion of Law II, R. 12).

(5) The Court erred in concluding as a matter of law that defendant is entitled to judgment and that plaintiff was not entitled to recover (Conclusion of Law III, R. 12).

(6) The Court erred in dismissing the complaint (Conclusion of Law III, R. 12).

(7) The Court erred in failing to grant judgment in favor of appellant.

ARGUMENT

The ruling below, that the statute as applied to the facts of the instant case, gives the right of action to the purchaser and not to the Administrator, is clearly erroneous

The solution of the question presented in this case turns on the construction of Section 205 (e) of the Act, which at the time of the violation involved herein read in pertinent part as follows:

> If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action * * * for treble the amount by which the consideration

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> exceeded the applicable maximum price. If * * * the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States.[7]

The first part of the subsection provides that the *buyer* may bring the action only when the commodity is purchased "for use or consumption other than in the course of trade or business." The latter part of the subsection provides that "If * * * the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action * * * on behalf of the United States." Earl Gilmore admittedly purchased the used crawler-type Allis-Chalmers tractor from defendant for use in his business of logging (R. 28–30, 79, 80). The express terms of the statute, therefore, vested the right of action in the Administrator. This conclusion is fortified by the pattern of the statute and its history, and by *all* of the decisions of the appellate courts and by a great preponderance of those in the lower courts. Defendant's contention that the Administrator may sue only where the purchaser buys for the purposes of resale, is neither supported by the language of the Act nor its legislative history.

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[7] The Stabilization Extension Act of 1944 (58 Stat. 636) made certain changes in the amount of recovery and enlarged the Administrator's right of action by authorizing him to sue (if certain conditions were satisfied) in cases where the former Act gave the right of action exclusively to the buyer or tenant. The enlargement of the Administrator's right of action, however, in no way affects this case. The Amendment made no change in providing who may sue in the first instance. It made changes in the measure of damages which are discussed infra p. 17.

The distinction between buyers who purchase for use or consumption "in the course of trade or business" and buyers "for use or consumption other than in the course of trade or business" appears in two sections of the Act.

Section 4 (a) [8] makes it unlawful for the *seller* in *all* cases to charge more than the maximum price prescribed by the Regulation. This section, however, prohibits the *buyer* from paying more than the maximum legal price only when the purchase is made "for use or consumption in the course of trade or business." No prohibition against paying more than the ceiling price is directed to one who buys for use or consumption other than in the course of trade or business.

This distinction in treatment between the two classes of buyers was undoubtedly responsive to considerations urged on Congress by the sponsors of the legislation. Congress was advised that:

> * * * a lot of pressure on sellers comes from the buyers themselves. This does not apply to the ordinary purchaser of household goods for immediate consumption; it only applies to persons who buy in the course of trade

[8] SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

> or business, so that the price regulation is made applicable both to the seller and to the buyer and only to those buyers who buy for business purposes in business transactions. (Hearings before the Senate Banking Committee on the Price Control Bill, H. R. 5990, 77th Cong., 1st Sess. (1941), p. 141 (testimony of David Ginsburg, General Counsel of OPACS and OPA)).

Section 205 (e) carries forward the same distinction. It was thought inappropriate, no doubt, to allow a recovery for an overcharge to a buyer who had himself violated the law in paying the overcharge. In fact, if the purchaser acted wilfully, he would be subject to criminal prosecution under Section 205 (b) of the Act. It would indeed be a strange anomaly in the law to allow a lawbreaker to benefit by his own unlawful act. Another consideration was the fact that commercial purchasers might be able to add the amount of the overcharge when they in turn sold the product to the consumer. To permit them also to recover damages from the seller would encourage them to violate the Act. In order, however, that those who sell to such purchasers should not escape civil liability, the statute granted the Price Administrator a civil right of action against them. It was a right to institute suit for statutory damage in all cases of "industrial buyers" (Senate Hearings, op. cit., at p. 216). The only purchasers who were empowered to sue for overcharges were "noncommercial consumers"[9] (Conference Report on the Price Control Bill,

[9] "The Senate amendment also contains a further provision, retained in the Conference Agreement, which permits a civil action by *noncommercial consumers* for treble the amount of any illegal

H. Rep. No. 1658, 77th Cong., 2d Sess. (1942) p. 26), "the housewife, in effect" (Senate Hearings, op. cit., at p. 141). As stated in the Senate Report on the Price Control Bill (S. Rep. No. 931, 77th Cong., 2d Sess. (1942) p. 8). Section 205 (e) "will permit *private* purchasers who buy for *personal* use or consumption *rather than in the course of trade or business,* to protect themselves against violations of the Act." [Italics ours.]

Defendants asserts (R. 99, 104), and the court held, that the proper test is whether the purchase was for the purpose of resale or for ultimate consumption (R. 11). But this is not the distinction made by the Act. The fact that a person may be an ultimate consumer, in and of itself is of no significance whatever in determining whether he is a purchaser for use and consumption *other* than in the course of trade or business. The purchaser is not given the right to sue whenever he buys for use or consumption, but only when he buys "for * * * use or *consumption other than in the course of trade or business.*" And was said by the Circuit Court of Appeals for the Fifth Circuit in *Bowles* v. *Seminole Rock*, 145 F. 2d 482 (C. C. A. 5th, 1944) rev'd on another ground 65 S. Ct. 1215, "the fact that the purchaser was the ultimate consumer of the material is of no significance, for the statute impliedly excludes not only purchasers for use in the course of trade, but also purchasers for consumption in the course of business. * * *"

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overcharge (or a minimum of $50) made by any seller of any commodity subject to a price ceiling." (H. Rep. 1658, 77th Cong., 2d Sess. (1942) at p. 26.)

And in *Lightbody* v. *Russell,* 293 N. Y. 492, 58 N. E. 2d 508, the New York Court of Appeals pointed out this distinction as follows:

> It is correctly pointed out in the dissenting opinion in the court below that the statute quite naturally divides purchasers of commodities coming within its terms into two classes—those who purchase for use in the course of their trade or business, that is, for a commercial use and those who purchase for use or consumption other than in the course of their trade or business, namely, for a noncommercial use. Each is an ultimate consumer. But it will be noted that the statute confers a cause of action upon the purchaser from a violator of the price regulation only in the event that he is in the latter class.

Further, defendant's reading of the statute and the court's construction of it would violate the policy of the Act. Those who use or consume in the course of trade or business include some of the largest and most influential purchasers. Common examples are the steel mill buying coal for use or consumption in its blast furnaces, the department store buying delivery trucks, or the railroad buying ballast for its right of way (*Bowles* v. *Seminole Rock & Sand Co., supra*). It has likewise been held, in the face of the contention that a farmer purchased his equipment for ultimate consumption and not for resale, that the Administrator has the cause of action, since the farmer buys a combine for use in harvesting his grain and for general farming use (*Speten* v. *Bowles,* 146 F. 2d 602 (C. C. A. 8th, 1945) cert. denied, April 23, 1945; *Bowles* v. *Rog-*

ers, 149 F. 2d 1010 (C. C. A. 7th, 1945); *Bowles* v. *Rock,* 55 F. Supp. 865 (D. C. Neb., 1944); *Bowles* v. *Silverman,* 57 F. Supp. 990 (D. C. So. Dak., 1944); *Lightbody v. Russell, supra;* cf. *Bowles* v. *Glick Brothers Lumber Co.,* 146 F. 2d 566 (C. C. A. 9th, 1944). Surely if such buyers fall within the prohibition of Section 4 (a) and are excluded from the benefits which Section 205 (e) was meant to confer on the non-commercial consumer, the purchaser in this case who bought the machine for use in his logging operations was likewise barred from suing under Section 205 (e), and therefore the Administrator has the right to sue.

This conclusion is also fortified by the official interpretation of the phrase "in the course of trade or business" as applied to buyers, issued by the Administrator as early as July 3, 1942 (OPA Service, p. 11: 804). In this interpretation, the Administrator declared:

> The phrase "in the course of trade or business" applies to *purchases by industrial and commercial consumers* as well as to purchases for resale. In general, *it applies to buyers* engaged in *commercial* activity for profit. [Italics ours.]

This contemporaneous interpretation of an administrative agency is entitled to great weight (*Lightbody* v. *Russell, supra; Bowles* v. *Glick Brothers Lumber Co., supra; United States* v. *American Trucking Associations,* 310 U. S. 534, 549; *Colgate-Palmolive-Peet Co.* v. *United States,* 320 U. S. 422, 426; *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, 315.

Moreover, Congress, by reenacting the Emergency Price Control Act in 1943 and in 1944 must be deemed to have ratified this interpretation of the Price Administrator and given it the force of law. (See *Silas Mason Co.* v. *Tax Commission,* 302 U. S. 186, 208; *Swayne & Hoyt, Ltd.,* v. *United States,* 300 U. S. 297, 300–303).

It remains only to consider the authorities cited by the defendant in the court below. There are: *Brown* v. *Glick,* (R. 109) (S. D. Cal.) 1 OPA OP. & Dec. 1050; *Lightbody* v. *Russell,* (R. 114, 115) 47 N. Y. Supp. (2d) 711 (App. Div. N. Y); *Brown* v. *Malloy,* (R. 115) (E. D. Pa.) 2 OPA OP. & Dec. 2112; and *Bowles* v. *Googins,* (D. C. Utah, 1944), 2 OPA OP. & Dec. 2049.

Consideration of Defendant's Authorities

Of these cases, *Brown* v. *Glick,* and *Lightbody* v. *Russell* were reversed on appeal. (See *Bowles* v. *Glick Brothers Lumber Co.,* 146 F. 2d 566 (C. C. A. 9th, 1945) cert. denied June 11, 1945; *Lightbody* v. *Russell,* 293 N. Y. 492, 58 N. E. 2d 508). To the extent that *Brown* v. *Malloy, supra,* is to the contrary, it should not be followed by this Court since it is opposed to the conclusions reached by every Circuit Court of Appeals that has had occasion to consider the question.

Bowles v. *Googins* (D. C. Utah, 1944), C. C. H. War Law Service on Price Control, Par. 51,176, 2 OPA Op. & Dec. p. 2049, also can be of no comfort to defendant here. In that case there were four causes of action pleaded. The first two involved purchases by

farmers of pipe for irrigating crops and for piping water for livestock. The third cause of action involved a purchase of a used oil well casing by a company engaged in the development of oil production. The fourth cause of action involved the purchase of used water pipe in the installation of a municipal water system.

It will therefore be noted that in each cause of action the purchase was, as in the instant case, made not for resale but for ultimate consumption. The Court held that the first two causes of action based on the overcharges of pipe purchased by the farmers did not belong to the Administrator on the ground that buyers such as farmers *may not fairly be presumed to know of the overcharges.* We think to this extent the court's opinion was erroneous and is squarely opposed to *Speten* v. *Bowles, supra,* decided by the Eighth Circuit Court of Appeals, and *Bowles* v. *Rogers,* decided by the Seventh Circuit Court of Appeals. The court's ruling on the third and fourth causes of action, however, follow the established rulings on the subject. The court held that the Administrator was vested with the authority to sue on the third and fourth causes of action despite the claim that the casing and water pipe was to be used for "ultimate consumption." Indeed, the court expressly found the "ultimate consumption" theory to be unsound, saying:

> An oil well company engaged in the development and production of oil is in the business of digging oil wells. The casing used in the drilling of oil wells is one of the essentials of the equipment in conducting this business, and

> it must be presumed, from the nature of the business carried on, that the purchase and use of such casing is so frequent and ordinary in that business that * * * the cause of action should belong to the administrator.

It thus appears that of the four cases upon which defendant relied, two have been overruled upon appeal, and one case in fact upheld the position that the Administrator has authority to sue where a commercial buyer purchases a commodity for use or consumption in his business even though the purchase is not made for resale purposes.

II

The Court erred in concluding as a matter of law that defendant had not violated MPR 136

The District Court concluded as a matter of law that "in said sale by defendant there was no violation by him of Maximum Price Regulation 136" (Conclusion of Law I, R. 11).

Section 1390.3 of MPR No. 136 provides as follows:

> Prohibition against dealing in machines or parts, machinery services or the rental of machines or parts at prices above the maximum. (a) On and after July 22, 1942, regardless of the terms of any contract, lease or other obligation:
>
> (1) No person shall sell, deliver, lease, rent or negotiate the sale or lease of any machine or part, or supply or negotiate the supply of any machinery service, at a price higher than the maximum fixed by this regulation.
>
> (2) No person, in the course of trade or

> business, shall buy, rent, lease or receive any machine or part or machinery service at a price higher than the maximum fixed by this regulation.

Beyond any doubt the defendant in this case sold the tractor at a price higher than the maximum fixed by the Regulation, and the Court so found when it declared that "the sales price of $2,800 for the tractor was in excess of the maximum price provided by MPR 136 in the approximate amount of $462.50" (Finding of Fact III, R. II). In the face of this finding of fact, it is obvious that Conclusion of Law I must be set aside.

That leaves for determination the measure of damages. Subsequent to the filing of suit, but prior to trial, Section 205 (e) of the Act was amended by Section 108 (b) of the Stabilization Act of 1944. Prior to the amendment once a violation was established, treble damages were mandatory (*Augustine* v. *Bowles,* 149 F. 2d 93 (C. C. A. 9th, 1945)). Under the amendment (see p. 2, *supra*), if a seller who made the over ceiling sale proves that the violation was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation, "his liability under the Section is established, but may be reduced to the amount of the overcharge, or $25, whichever is greater." (*Augustine* v. *Bowles,* supra.)

Here defendant pleaded this defense in his amended and supplemental answer (R. 5) but the district court made no finding thereon. For that purpose and for the purpose of assessing damages, the case should be

remanded. (See, *Speten* v. *Bowles,* supra; *Bowles* v. *Franceschini,* 145 F. 2d 510 (C. C. A. 1st, 1944).)

The decision of the court below is plainly erroneous and opposed to the great weight of authority. To uphold it would subvert the clear policy which Congress attempted to effectuate by enacting Section 205 (e). Accordingly, we respectfully submit that the order of the court below dismissing the complaint should be reversed, and the cause remanded for the purposes indicated above.

Respectfully submitted,

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